Filed 7/30/15 In re X.D. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re X.D. et al., Persons Coming Under the Juvenile Court Law.	B260312 (Los Angeles County Super. Ct. No. CK94421)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.M., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Teresa Sullivan, Judge. Affirmed.

Robert R. Walmsley, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

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In this dependency case, mother A.M. appeals from orders denying her petitions for modification under Welfare and Institutions Code section 388[1] and the order terminating her parental rights over her young sons, X.D. and N.D. We affirm.

FACTS AND PROCEDURE

1. Detention, Jurisdiction, and Disposition

The children came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) in November 2012 when police arrested mother and father[2] at the scene of a crime and X.D. was with them. A group of seven to 10 men descended on a gathering at a home in Palmdale and tried to fight with the resident and his friends. The resident and his friends ran from the home, and when they returned approximately 15 to 20 minutes later, one friend's car had been vandalized, and her custom speaker box was missing. While an officer was interviewing the owner of the vandalized car at the scene, father drove up and got out of his car. The witness identified father as one of the men who had tried to start the fight. The officers immediately smelled alcohol on father. His eyes were "glossy and droopy." They found mother in the rear seat of the car slumped over and passed out. She was lying on top of X.D., who was sleeping.[3] X.D. was one year old and not in a car seat. On the seat next to mother was the custom speaker box removed from the witness's car. Father's breath was tested and found to have a blood-alcohol level of 0.144 percent. When officers searched mother, they found in her bra a glass pipe commonly used to smoke methamphetamine and a plastic baggie containing a crystalline substance resembling methamphetamine. Both parents were arrested on charges of child endangerment.

Mother told the social worker that, on the night of the incident, she had two beers and several shots of vodka and smoked methamphetamine while at her friend's house.

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1 Further undesignated statutory references are to the Welfare and Institutions Code.

2 Father is not a party to this appeal.

3 N.D., who was six weeks old at the time, was at home with paternal grandmother.

Father met her at the friend's house and had X.D. with him. Father had some drinks at the gathering. Mother admitted she was intoxicated and did not remember what happened after they left, including whether X.D. had a car seat. Mother was sobbing and expressed remorse as she talked to the social worker and admitted she had "made a big mistake." Mother said she began using methamphetamines at age 16 and had used three or four times, but she denied being a habitual user.

The court found a prima facie case for detention and placed the children with maternal grandmother in November 2012. The court ordered mother to drug test that day and continue to on-demand drug test. It also ordered referrals for drug rehabilitation, parenting, and individual counseling. Mother missed the drug test she was ordered to take the day of the detention hearing. Approximately a week later, mother came into the DCFS office, and the social worker asked her to drug test. Mother later reported she was unable to drug test that day because of a mistake DCFS made with the drug test referral. She agreed to drug test the next day. She did not appear for a drug test the next day, but did so several days later and tested negative.

At the jurisdiction and disposition hearing in January 2013, mother and father both filed a waiver of rights and pleaded no contest. The court sustained two section 300, subdivision (b) allegations of the petition with minor alterations and dismissed the remaining subdivision (b) allegation and subdivision (j) allegations in the interest of justice. The sustained allegations were that (1) father drove while under the influence of alcohol with X.D. and mother as passengers, and both parents failed to put X.D. in a car seat, and (2) mother had used illicit substances on prior occasions and had used methamphetamine and alcohol while X.D. was under her care in November 2012. Mother's case plan called for drug/alcohol rehabilitation and a 12-step program, weekly drug testing, parenting classes, individual counseling, which could be done within her substance abuse program, and monitored visits of four hours per week. The children remained placed with maternal grandmother.

2. Six-month Review Period

DCFS had to re-place the children with foster parents in March 2013 because maternal grandmother had a critical medical emergency relating to her husband's health and could no longer care for the children. Mother had partially complied with the case plan during the review period. Mother visited weekly the first three months of the children's placement with the foster parents, but for the last two months of the review period, her visits had been sporadic.

She reported in March 2013 that she had enrolled in a program but could not provide proof of enrollment to the social worker and said she did not have the program's phone number. She then missed two intake appointments. She spoke with the social worker on the day of her third scheduled intake appointment and asked the social worker if she could get another intake date. The social worker instead encouraged mother to go to that day's appointment, and mother said she would.

Mother had not drug tested regularly. She had tested negative twice but did not appear for nine tests. In August 2013, mother provided evidence that she had enrolled in a six-month residential treatment program on July 31, 2013. For the first seven days of the program, all her random drug tests had been negative.

At the review hearing in August 2013, the court found return of the children to the parent's physical custody would create a substantial risk of detriment to their well-being, and it continued jurisdiction.

3. 12-month Review Period

A progress report in September 2013 indicated mother remained enrolled in her program, which included individual counseling and parenting classes as well as substance abuse treatment, and was expected to complete it in January 2014. She was discharged from the program in November 2013, however, for testing positive for methamphetamines. Mother reported that she had attended another outpatient treatment program from March to April 2014, but the agency had closed because it was under investigation. The social worker called the program but could not reach anyone and therefore could not verify mother's attendance.

Mother had visited inconsistently during the review period, averaging about two visits per month. X.D. and N.D. appeared to be bonding significantly with the foster parents, who had also developed appropriate and loving attachments to the children. They referred to foster parents as "mama" and "daddy." Both parents wanted the children to remain with the foster parents as opposed to returning to maternal grandmother. They appeared happier since they went to live with the foster parents. DCFS recommended adoption by the foster parents as the permanent plan.

At the contested review hearing in May 2014, the court found mother and father were not complying with their case plans and terminated reunification services. It set the matter for a hearing on the selection and implementation of a permanent plan under section 366.26.

4. Permanent Plan Hearing and Section 388 Petitions

On the day of the permanent plan hearing, September 24, 2014, mother filed a section 388 petition asking the court to reinstate reunification services. Mother had entered a residential treatment program on July 2, 2014, that included a drug rehabilitation program, a 12-step program, parenting classes, drug testing, and individual counseling. She had tested negative on all drug tests since entering the program. Mother argued that she was making substantial progress toward alleviating the issues that brought the children before the court, and it was in the children's best interests that they grow up with mother. The court continued the matter for several days for a hearing on the section 388 petition and trailed the section 366.26 hearing. Before the next hearing, mother submitted a letter to the court acknowledging she had made mistakes and indicating she was willing to do whatever necessary to reunite with her children. She also submitted a letter from her therapist in the program indicating she had attended all her mental health appointments and was "positive and appear[ed] to be open to treatment."

At the continued hearing, the court denied mother's section 388 petition. The court noted that, while mother had made progress, her drug-free lifestyle was too recent to constitute changed circumstances, and it was not in the best interests of the children to

grant the petition. The court continued the permanent plan hearing for approximately a month.

On October 28, 2014, mother filed another section 388 petition to reinstate reunification services or have the children return to mother's custody at the residential treatment center where she lived. Since the last section 388 petition, mother had successfully continued in her treatment program and completed a parenting course. She continued to test negative for drugs. Mother argued that she was making significant and substantial progress in all services identified in her case plan, she was visiting with the children, and she was pregnant. She felt it would be in the children's best interest to grow up with their sibling.

The court heard the section 388 petition on October 30, 2014, while also conducting the contested permanent plan hearing. It denied the petition, noting again that, while circumstances were improving, mother had only recently enrolled in the treatment program and circumstances had not "changed" as required by the statute. Moreover, it was not in the best interests of the children, who had spent most of their short lives outside mother's care, to change their situation.

The court then found that the children were adoptable, no exception to adoption applied, and it would be detrimental to return them to the parents. It terminated mother's and father's parental rights. Mother filed a timely appeal.

DISCUSSION

1. The Court Did Not Err in Determining ICWA Did Not Apply

Mother contends the court erred in finding the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) did not apply and in not mandating compliance with the investigation and notice requirements. We disagree.

a. Background

When the social worker first interviewed mother right after her arrest, mother stated that she had no American Indian ancestry. Father said the same. Nevertheless, the petition had a hand-written notation on it stating: "Shoshone [¶] maunt inquiry." On mother's "Parental Notification of Indian Status" form (ICWA-020 form), she also

checked the box that said "I may have Indian ancestry," and someone handwrote "Shoshone maunt Carmen [M.]" on the space for "Name of tribe(s)."

According to the minutes of the detention hearing, the court ordered DCFS to contact the maternal side of the family to investigate the claim of American Indian heritage. It ordered the social worker to file a supplemental report regarding the investigation, including the names of the interviewees and relatives' dates and places of birth as far back as the social worker could ascertain. At a later arraignment on the petition, both mother's and father's counsel denied any American Indian heritage on behalf of the parents. Mother was present at the arraignment.

The jurisdiction/disposition report indicated that maternal grandmother denied any American Indian heritage in the family. It further indicated that maternal grandfather had died four years earlier, and "Carmen" was mother's aunt. At the jurisdiction hearing, at which mother was again present with her counsel, the court found ICWA did not apply.[4]

b. Analysis

An "Indian child" is one who is either a "member of an Indian tribe or . . . eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); see Welf. & Inst. Code, § 224.1, subd. (a).) The court and DCFS "have an affirmative and continuing duty to inquire whether a [dependent] child . . . is or may be an Indian child." (Welf. & Inst. Code, § 224.3, subd. (a).) If the court or social worker knows or has reason to know that an Indian child is involved, the social worker must further inquire by interviewing the parents, any Indian custodian, and extended family members to gather the information necessary for notice to be sent to the pertinent tribes. (*Id*., subd. (c).) Notice must then be sent to the tribe at issue if the court

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[4] While there is a minute order of this hearing in the record, there is no reporter's transcript of this hearing. Instead, the record contains a sworn certification from the court reporter indicating that she could not prepare a transcript for this date because she could not locate notes for that date after a thorough and extensive search of her files. The ICWA finding was recorded in the minute order.

or social worker knows or has reason to know that an Indian child is involved. (25 U.S.C. § 1912(a); Welf. & Inst. Code, §§ 224.2, subds. (a), (b), 224.3, subd. (d).) "The circumstances that may provide reason to know the child is an Indian child include . . . the following: [¶] (1) A person having an interest in the child . . . or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1).) "We review a court's ICWA findings for substantial evidence." (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467.)

Here, the court and DCFS complied with their duty of inquiry, and the court's determination that ICWA did not apply was supported by substantial evidence. On the one hand, the detention report indicated that mother denied any Indian heritage when the social worker first interviewed her. On the other hand, mother's ICWA-020 form indicated she may have Shoshone ancestry and identified maternal aunt "Carmen." The conflicting evidence certainly merited further inquiry, and the court thus rightly ordered DCFS to inquire further through the maternal side. (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1168 ["Having received conflicting information, the juvenile court had a duty to further inquire of father . . . ."].) After the court ordered further inquiry, mother again denied having Indian heritage at her arraignment. The social worker nevertheless inquired by asking maternal grandmother, who indicated the family did not have any Indian heritage. There is no indication that mother objected when the court found ICWA did not apply at the jurisdiction hearing. The multiple indications from mother and maternal grandmother that the family did not have Indian heritage meant that the court did not know and had no reason to know X.D. and N.D. were Indian children. These multiple denials also constituted substantial evidence to support the court's ICWA finding. Even if the social worker did not provide the dates and places of birth of mother's relatives like the court originally ordered, such information was required to be collected only if the court or social worker knew or had reason to know the children were Indian children. (§§ 224.2, subd. (a)(5)(C), 224.3, subd. (c).)

Although even a suggestion of Indian ancestry may trigger the notice requirement (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848), the suggestion here was rebutted through further inquiry. We find no ICWA-related cause to reverse.

2. The Court Did Not Err in Denying the Section 388 Petitions

Mother argues the court should have granted the section 388 petitions and either reinstated her reunification services or returned the children to her care. We again disagree.

Section 388 permits a parent of a dependent child to petition the court "to change, modify, or set aside any order of court previously made" based on a "change of circumstance or new evidence." (§ 388, subd. (a)(1).) "A ruling on a section 388 petition is 'committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.]' [Citation.] Thus, we may not reverse unless the juvenile court exceeded the bounds of reason, and we have no authority to substitute our decision for that of the lower court where two or more inferences can reasonably be deduced from the facts." (*In re D.B.* (2013) 217 Cal.App.4th 1080, 1088-1089.)

The moving party has the burden of proving (1) changed circumstances or new evidence and (2) the change in the court order would be in the best interests of the dependent child. (§ 388, subds. (a)(1), (d); *In re D.B.*, *supra*, 217 Cal.App.4th at p. 1089.) The moving party must show a genuine change in circumstances of such a significant nature that it requires modification of the challenged prior order. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529; *In re Heraclio A.* (1996) 42 Cal.App.4th 569, 577; *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.) Overall, the court considers "the seriousness of the reason for the dependency and the reason the problem was not overcome; the relative strength of the parent-child and child-caretaker bonds and the length of time the child has been in the system; and the nature of the change in circumstances, the ease by which the change could be achieved, and the reason the change was not made sooner." (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447.)

In this case, the court did not abuse its discretion in denying mother's petitions, which she filed roughly one month apart. Mother did not show a significant and genuine change in circumstances in connection with either petition. The reason for dependency—use of illicit substances, including while X.D. was under her care—was relatively serious. (*In re Kimberly F., supra*, 56 Cal.App.4th at p. 522 ["[T]he reason for the dependency [(an unsanitary home)] was not as serious as other, more typical reasons for dependency jurisdiction, such as sexual abuse, physical abuse or illegal drug use . . . ."].) Mother's own choices appear to be the reason she did not overcome the problem within the reunification period. Mother drug tested rarely during the first review period and did not appear for most of her tests. She missed several intake interviews for a treatment program. She finally enrolled in a treatment program, but only at the end of the six-month review period, and she had been in the program for little more than a week at the time of the six-month review hearing. She was in that program for approximately three months before being discharged for testing positive for methamphetamines. Roughly four months later she reported attending another program for a month, but DCFS could not verify her participation in that program. At the time the court terminated reunification services, the children had been detained from her for nearly a year and a half, she had yet to complete a drug treatment program, and she was not engaging in any of the other services in her case plan like counseling or parenting classes. The court justifiably terminated reunification services at that point and set the matter for a permanency planning hearing.

Further, the factors relating to the change—the nature of the change, the ease with which mother could have achieved the change, and the reason she did not make the change sooner—supported the court's denial of her petitions. About a month after the court terminated reunification services, mother enrolled in the new treatment program. She was in that program for less than three months when she filed the first section 388 petition. With the second petition, she had been in the program for a month longer, i.e., between three and four months. While this was a superficial change from the immediately previous period of noncompliance with the case plan, we cannot say it was a

significant and genuine change in the overall scheme of things that warranted modifying the court's order. Mother had previously completed three months in a program, only to be discharged for testing positive. The court in *In re Kimberly F.* noted the difficulty of finding genuinely changed circumstances in a case like this. The court explained: "[W]e doubt that a parent who sexually abused his or her child could ever show a sufficient change of circumstances to warrant granting a section 388 motion. Likewise the parent who loses custody of a child because of the consumption of illegal drugs and whose compliance with a reunification plan is incomplete during the reunification period. It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform." (*In re Kimberly F., supra*, 56 Cal.App.4th at p. 531, fn. 9.)

Additionally, mother did not provide any good reason why she could not have re-enrolled in a treatment program before the court terminated reunification services, and she did not describe any difficulties that might have barred her way. It therefore seems she could have made this "change" with relative ease. She had low cost/no cost referrals from DCFS from the beginning and failed to take advantage of that.

Finally, if we look at the factors going to the best interests of the children—the relative strength of the parent-children and children-caretaker bonds and the length of time the children have been in the system—these factors also supported the denial of the petition. The children were removed in November 2012. X.D. was one year old and N.D. was six weeks old when they were removed. Mother filed her petitions in September and October 2014. N.D. had thus been in the system for the nearly his entire life and X.D. for most of his life when mother sought to change the court's order. Mother visited inconsistently. The children had also been living with the foster parents for most of their time in the dependency system, and they were strongly bonded with their caretakers, referring to them as "mama" and "daddy." "After reunification services have been terminated, the parents' interest in the care, custody and companionship of the child are no longer of overriding concern. [Citation.] The focus then shifts to the child's need for permanency and stability, and there is a rebuttable presumption that continued foster care is in the child's best interests. [Citations.] . . . When, as here, the permanent plan is

adoption, that presumption is even more difficult to overcome." (*In re Aaliyah R., supra*, 136 Cal.App.4th at pp. 448-449.) The court could properly look to the children's need for permanency and stability in denying mother's section 388 petition and find it was not in the children's best interests to grant mother's petitions.

In sum, the court did not abuse its discretion in denying the section 388 petitions.[5] Mother's argument that we should reverse the order terminating parental rights is premised on her argument that the court abused its discretion in denying the petitions. Given that we disagree with that foundational premise, we decline to reverse the order terminating parental rights.

DISPOSITION

The orders are affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. GRIMES, J.

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5 Mother suggests that the court erred not just in denying the petitions but in not granting evidentiary hearings on the petitions. This contention lacks merit. The court held hearings on the petitions. Mother filed the first petition on the day the court had first scheduled for the permanent plan hearing. The court continued the hearing partly so that it could hold a hearing on the section 388 petition, and that hearing occurred. Mother filed the second petition two days before the contested permanent plan hearing. The court heard argument on the petition at the scheduled permanent plan hearing. It also asked her counsel twice whether she had "any additional evidence" or "[a]nything else" to present on the petition before the court made its ruling. Mother's counsel declined to present anything other than argument and her written materials.